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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1302

THOMAS H. FITZGERALD,

Petitioner,

against

MARTIN P. CATHERWOOD, as Industrial Commissioner of the State of New York,

Respondent.

BRIEF IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 388 F. 2d 400. The opinion of the District Court is not reported. It is set forth in Appendix B to the petition.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. May a state labor law impose fiduciary obligations on officials of labor organizations even though such subject

is regulated by federal statute where there is no persuasive evidence of Congressional design to preempt the field?

2. Does New York Labor Law, Article 20, Section 723.1 (a) and (b) constitute a bill of attainder where such legislation simply requires that persons possessing general characteristics abstain from certain prohibited activities.

3. Was the petitioner entitled to a statutory three-judge court where his one claim that a state statute is preempted by federal law is coupled with an insubstantial federal constitutional claim?

Pertinent Statutes

New York Labor Law § 723:

"§ 723. Specific prohibited financial interests and transactions

1. Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization:

(a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;

(b) To have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from, or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer;"

§ 725.4:

"4. Each wilful and knowing violation of any of the provisions of sections seven hundred twenty-three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both. Added L. 1959, c. 451, § 1, eff. June 1, 1959."

LMRDA 29 U.S.C. § 501(a):

"§ 501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting

to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

29 U.S.C. § 501(b):

"(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board of officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

29 U.S.C. § 523(a):

"§ 523. Retention of rights under other Federal and State laws

(a) Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor

organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

POINT I

Section 723.1 (a) and (b) of Article 20-A of the New York State Labor Law is not preempted by federal law (LMRDA).

In the area of federal-state jurisdiction covering the same subject matter, by virtue of the supremacy clause of the United States Constitution, it is clear that federal law is paramount if Congress has clearly indicated an intention to preempt the field. *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230. But no such clear statement of congressional intent to create uniform federal fiduciary obligations or remedies regarding union officials is found in the LMRDA.

In considering the question of preemption, the intention of Congress to exclude the state from exercising its police power must be clearly manifested. *Napier* v. *Atlantic Coast Lines R.R. Co.*, 272 U. S. 605, 611. The decisions of this Court have consistently held that state statutes, otherwise valid, must be upheld unless the conflict is so direct and positive that the two cannot stand together or be reconciled or there is persuasive evidence of Congressional design to preempt the field. *Head* v. *New Mexico Board*, 374 U. S. 424, 430; *Kelly* v. *Washington*, 302 U. S. 1, 10; *Rice* v. *Sante Fe Elevator Corp., supra; California* v. *Zook*, 336 U. S. 725, 729; *Huron Cement Co.* v. *Detroit*, 362 U. S. 440. Identity of purpose between federal and state statutes does not mean automatic invalidity of state measures. *Cali-*

fornia v. *Zook, supra* at 730; *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U. S. 714. On the contrary, federalism in its practical operation, favors survival of the reserved authority of the state over matters that are the intimate concern of the state unless Congress has clearly withdrawn all state authority or the state's claim is in unmistakable conflict with what Congress ordered. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767; *DeVeau* v. *Braisted,* 363 U. S. 144.

Prior to the passage of the LMRDA, the majority report of the House Judiciary Committee stated that its bill would "preclude the Courts from presuming a legislative intent to preempt the field," and that its bill, as reported favorably to the House (H.R. 3) "would not allow such construction unless the Act contained express provision to that effect, or unless there was a direct and positive conflict between such Act and the state so that the two could not be reconciled or consistently stand together" (Judiciary Committee Report H.R. Rep. No. 1878, 85th Cong., 2d Sess. [1958]).

This approach culminated in the enactment of § 603(a) of the LMRDA (29 U.S.C. § 523[a], as amended):

> "Sec 603(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any state, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

This section has been described by this Court as "an express disclaimer of pre-emption of state laws regulating

the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act [LMRDA].'' *DeVeau* v. *Braisted,* 363 U. S. 144, 157; see also *Bell* v. *Waterfront Commission,* 183 F. Supp. 175, 178 S.D.N.Y.), *aff'd* 279 F. 2d 853 (2d Cir.). Plainly no other provision in the LMRDA contains any contrary expression with respect to the statutes involved here (Subchapter VI, LMRDA).*

In a comment on the fiduciary provisions of the LMRDA Professor Summers observed that Congress there sought

> ''to establish a federal minimum and enforce it without reducing any obligation imposed by state law. 105 Cong. Rec. 5856-61 (daily ed. April 23, 1959). Indeed the very words of § 603(a) [quoted above] originated as a saving clause incorporated in the fiduciary obligation provision added during the Senate Debates, and the words 'responsibilities . . . of any officer were included in that clause for the very purpose of preserving state fiduciary obligations.' *supra* at p. 5860. The fixing of a federal standard, therefore caused no implications that this was the maximum obligation with which union officers should be burdened. The state is free to establish a higher standard and to enforce it with more vigorous sanctions. For example, the New York statute allows for prohibition of transactions not forbidden by federal law . . . In short the union officer must measure up to both standards subject to the sanctions of each or both. Summers, *Pre-emption & the Labor Reform Act,* 22 Ohio St. L. J. 119, 140-1 (1961).''

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* It should be noted that the LMRDA does contain provisions, which specifically declare Congress' intention of federal pre-emption with respect to other portions of the Act. Thus, for example, certain provisions in Subchapter V (Elections) of the LMRDA are preempted by federal law: ". . . The remedy provided by this subchapter [V] for challenging an election already conducted shall be exclusive." 29 U.S.C. § 483. See also 29 U.S.C. § 435(c); *DeVeau* v. *Braisted, supra* at 156.

Moreover the congressional debates clearly evidence the fact that Congress was well aware of New York's Labor legislation which was passed prior to the approval of the LMRDA.* See 2 *Legislative History of the Labor-Management Reporting and Disclosure Act*, 1019 (NLRB: Washington 1959); compare *DeVeau* v. *Braisted, supra*, at 154. Yet Congress still deliberately chose to permit concurrent remedies as to union officials' fiduciary obligations.**

It is not at all helpful to a determination here, as the petitioner attempts, to confuse the scope of the instant problem. We are *not* concerned with the reporting and election sections of the LMRDA which have their counterparts as well in the New York Labor Law (N. Y. Labor Law § 726; 705 *et seq.*).

Likewise, the petitioner's discussion of *Hill* v. *Florida*, 325 U. S. 538, does not enhance his position. The *Hill* case involved the NLRA, not the LMRDA now under consideration. The LMRDA specifically deals with the fiduciary responsibilities of labor organization officials and Congress has clearly indicated that the states are free to legislate in this area as well. 29 U.S.C. § 523(a). Compare *DeVeau* v. *Braisted, supra.*

The point to be made is simple. The LMRDA (29 U.S.C. § 501[a]) imposes certain responsibilities *inter alia* upon officers of labor organizations and in 29 U.S.C. § 501(b) sets forth certain sanctions available in the event of a violation of such fiduciary obligations. Similarly, the New York law imposes these obligations upon officers

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* Article 20-A, New York Labor Law became law on April 15, 1959 (L. 1959 c. 451). The LMRDA was approved by the President on September 14, 1959.

** See remarks of Senator Holland in the Congressional debates on the LMRDA suggesting "a provision for the creation of a concurrent remedy" which culminated in passage of 29 U.S.C. § 523(a), 2 *Legisative History of the Labor Management Reporting and Disclosure Act, supra*, at 1113.

of labor unions. The determination to be made here is whether New York may permissibly impose harsher restrictions and harsher sanctions for violations thereof.

We say that in the absence by the Congress of a specific declaration that it seeks to occupy the field on this subject, the state may so legislate. This has not been answered by the petitioner and resort to a variety of other sections, some of which may require preemption (see, *e.g.*, 29 U.S.C. §§ 435[c] and 483), is not responsive to the issue at hand. If anything, it simply buttresses our argument that Congress intentionally sought to disclaim preemption over the subject before this Court.

Accordingly, the Court below properly held that New York's Labor Law § 723.1(a) and (b) were valid exercises of the state's police power and were not preempted by the LMRDA.

POINT II

Section 723.1(a) and (b) of the New York Labor Law does not constitute a bill of attainder but merely evidences the State's legislation with respect to persons possessing general characteristics who must abstain from certain activities.

In *United States* v. *Brown*, 281 U. S. 437, this Court made it unmistakably clear "that a legislature can provide that persons possessing certain characteristics must abstain from certain activities," *id.* at 454, n. 29, the only limitation being that such a result must be accomplished by "rules of general applicability", with the task of applying those rules left to agencies other than the Legislature, *id.* at 461. Quite pertinently to this inquiry, this Court in *Brown* discussed its earlier decision in *Board of Governors* v. *Agnew*, 329 U. S. 441, as an example of permissible legislation.

The statute in the *Agnew* decision, § 32 of the Banking Act of 1933, closely parallels the one involved in the case at bar. That section prohibited, *inter alia,* any partner or employee of any partnership "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" from serving at the same time as an officer, director, or employee of a member bank. And, pursuant to Section 30 of that Act the respondents in *Agnew* were removed from office as directors of the bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of Section 32 quoted above.

This Court in *United States* v. *Brown, supra,* in its discussion of *Agnew, supra,* noted that *Agnew* did not constitute a bill of attainder since "Congress merely expressed the characteristics it was trying to reach in an alternative shorthand way." *Id.* at 454-455. Moreover, the Court clearly held there that a statute which sets "forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall not hold union office" and in addition leaves "to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics", would not violate the constitutional injunction against a bill of attainder. *Id.* at 450.

The New York Statute before this Court falls within the scope of constitutionally permissible conflict of interest laws which pursue only legitimate regulatory objectives. Such legislation has never been held to constitute a bill of attainder. See *Fleming* v. *Nestor,* 363 U. S. 603, 614-616. Moreover, New York's law provides for penal sanctions only in the event the accused has wilfully and knowingly violated the provisions of Labor Law §§ 723-724—a determination to be reached by a court and jury—clearly a negation of a bill of attainder. *United States* v. *Brown, supra* at 450.

The petitioner's painfully strained attempt to distinguish the case at bar from this Court's decision in *Board of Governors* v. *Agnew*, 329 U. S. 441, falls hopelessly short of the mark.

It is true that *Agnew* was distinguished on three grounds from the situation present in *United States* v. *Brown*, 381 U. S. 437 (1965), but our case similarly can be distinguished from *Brown* on the same three points.

First, in *Brown* the Court noted that unlike *Agnew*, the statute in *Brown* inflicted "its deprivation upon the members of a political group thought to present a threat to National security". *United States* v. *Brown*, *supra* at 453. As in *Agnew* no such condemnation is presented here, nor is it possibly arguable that such is the case.

Second, unlike *Brown* but as in *Agnew*, the statute here "incorporates no judgment censuring or condemning any man or group of men." *Id.* at 453-454. Rather, Congress in the Banking Law in issue in *Agnew*, as the New York legislature here, "relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to *any* man—not just certain men or members of a certain political party". *United States* v. *Brown*, *supra* at 454. (Emphasis in text.) Thus, the evil clearly is not in the legislative designation, as the appellant suggests, of the conflicting positions (*e.g.* a bank officer vis-a-vis an officer of an indemnity house [as in *Agnew*] or a corporate officer-employee-officer as here) but whether or not such conflicting positions would tempt "any man" (as in *Agnew* and as in the case at bar) rather than "certain class of men such as members of the Communist Party, as in *Brown*.

Finally, petitioner seeks to distinguish our case and the *Agnew* decision on the ground that the *Agnew* statute, unlike the one before this Court, was permissible because it merely expressed in "an alternative shorthand way the

undesirable characteristics it sought to prohibit." *United States* v. *Brown, supra* at 454. Petitioner obviously misreads *United States* v. *Brown, supra.* In *Brown* this Court simply held that ordinarily the legislature specifically provides, in conflict of interest statutes, that persons possessing certain characteristics must abstain from certain activities. But if the legislature so desires, it may in some cases, use a shorthand phrase to summarize the characteristics with which it is concerned, *id.* at 454, n. 29. Thus, the Court *does not* at all *condemn* the legislature's longhand setting down of all the general characteristics resulting in conflict of interests; it simply *condones,* under certain circumstances, a shorthand way of describing such characteristics.

This analysis of *Agnew* and the instant case on one hand, and the distinguishable *Brown* case on the other hand, disposes of petitioner's attempt to equate the evils in *Brown* with the constitutionally permissible boundaries of the conflict-of-interest statute here.

Petitioner's claim of bill of attainder is clearly insubstantial as held below.

POINT III

The Court of Appeals properly held below that petitioner was not entitled to the convening of a three-judge court.

The simple answer to petitioner's "Point III" is that he is not entitled to a three-judge court where the preemption claim is joined, as here, with an insubstantial federal constitutional claim, *i.e.,* his bill of attainder claim. See *Swift & Co. et al.* v. *Wickham,* 382 U. S. 111, 115.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should be denied.

Dated: New York, N. Y., May 22, 1968.

Respectfully submitted,

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